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No. 15-339

# In the Supreme Court of the United States

MICHAEL ROSS,

*Petitioner,*

v

SHAIDON BLAKE,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

The question presented in the petition addresses whether the exhaustion requirement of the Prison Litigation Reform Act (PLRA) bars a lawsuit by a prisoner who made an objectively reasonable mistake when pursuing his administrative remedies. But that is not a question implicated by the facts of this case. As we have said all along and now conclusively demonstrate, respondent Shaidon Blake did everything that Maryland law required him to do. The additional procedures that petitioner asserts that respondent should have pursued were *procedurally foreclosed* and thus *un*available.

The first question presented, therefore, is:

Whether petitioner has satisfied his affirmative burden of demonstrating that respondent failed to exhaust his administrative remedies.

Even if, contrary to fact, other remedies existed for respondent to pursue, the procedures for doing so were so beset with traps and miscues that no objectively reasonable prisoner would have understood what was required of him. Every court of appeals to address circumstances like these has said (in accord, conceptually, with the decision below) that such remedies are not "available" within the meaning of the PLRA.

The second question presented is:

Whether an administrative remedy is "available" within the meaning of the PLRA when an objectively reasonable prisoner would not know which procedure to use or how to use it.

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## GLOSSARY

This brief uses these acronyms and shorthand:

- **ARP**: Maryland's "Administrative Remedy Procedure."
- **the Department**: Maryland's "Department of Public Safety and Correctional Services."
- **IGO**: Maryland's "Inmate Grievance Office."
- **IIU**: Maryland's "Internal Investigative Unit."
- **PLRA**: The "Prison Litigation Reform Act."

# BRIEF FOR RESPONDENT

## STATEMENT

Two prison guards, petitioner and James Madigan, assaulted respondent. This is not conjecture: the prison warden himself found that respondent was the victim of "excessive" force; the prison forced Madigan to resign; and a jury has already returned a $50,000 verdict against Madigan. This is, in other words, precisely the kind of meritorious prison lawsuit that Congress *wanted* in federal court.

This case does not, however, present the question addressed by petitioner. He raises a question regarding whether the Prison Litigation Reform Act's (PLRA) exhaustion requirement bars a lawsuit by a prisoner who made an objectively reasonable mistake when pursuing his administrative remedies. But—as we demonstrate in detail—respondent made no mistake at all. In fact, the remedies and procedures that petitioner says that respondent should have pursued were categorically *un*available to him. The Court should either affirm on this basis, or it should dismiss the writ of certiorari as improvidently granted.

Petitioner's contrary argument rests on a fundamental misunderstanding of the administrative remedies available to Maryland prisoners—a telling (and troubling) fact, given that petitioner is represented by the Attorney General of Maryland. Because Maryland's Internal Investigative Unit (IIU) investigated the assault, no other administrative remedy was available to respondent. We prove this point conclusively by identifying several examples of prisoners who attempted to do what petitioner says respondent should have done. In *every* case, the filings were dis-

missed as procedurally improper. This is not subject to reasonable debate, and it resolves this case.

If the Court nonetheless reaches the question that petitioner presents, it should affirm. The PLRA requires a prisoner to exhaust "available" remedies. As the courts of appeals have uniformly held, an administrative remedy is not "available" if it is so convoluted and opaque that an objectively reasonable prisoner would not understand which procedure to use or how to use it. Although it rests on a slightly different rationale, the decision below is fully consistent with this understanding of the PLRA.

Petitioner takes the position that, in applying the PLRA's exhaustion requirement, a court can *never* consider whether a prison has adopted administrative procedures that are indecipherable. That contention, if adopted by this Court, would strip the term "available" of meaning, turn otherwise-settled PLRA law on its head, and give prisons an incentive to create bewilderingly complex administrative procedures. But as the Court suggested in *Woodford* v. *Ngo*, 548 U.S. 81, 102 (2006), a grievance procedure is not "available" if it "trip[s] up all but the most skillful prisoners."

**A. Legal background.**

The PLRA requires a prisoner to "exhaust[]" "such administrative remedies as are available" prior to bringing suit. 42 U.S.C. § 1997e(a).

In Maryland, the typical method for pursuing prison remedies is the Administrative Remedy Procedure (ARP). The ARP has three steps: a prisoner first files a grievance with the prison warden; the prisoner may then appeal the warden's resolution of the complaint to the Commissioner of Correction;

and, finally, the prisoner may appeal the disposition of the case to the Inmate Grievance Office (IGO). See Pet'r Br. 6-7 At the time of the assault at issue here, a prisoner had fifteen days from the incident to request an administrative remedy. See *Evans* v. *State*, 914 A.2d 25, 69 (Md. 2006) (describing fifteen-day limitations period).

Separately, Maryland maintains an Internal Investigative Unit (IIU)[1] that investigates allegations of misconduct by prison staff. The IIU has mandatory jurisdiction over claims that a prison guard used "excessive force." Md. Code Regs. § 12.11.01.05(A)(3). Maryland law provides that "[a]n agency head or a designee shall * * * [r]elinquish authority for an investigation undertaken by the IIU, including an investigation initially assigned to an agency head, or a designee, that is subsequently assumed by the IIU." *Id.* § 12.11.01.08.

On August 27, 2008 (after the incident at issue in this case), Maryland amended prison Directive 185-003; the amended directive states that, when the IIU investigates an incident, a warden must dismiss an ARP "request for procedural reasons" if it shares the "same basis" as an IIU investigation. JA 367. As we will document (see, *infra*, pages 15-24), this amendment codified then-existing practice.[2] At the time of

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[1] In 2014, Maryland changed the name of the IIU to the "Intelligence and Investigative Division." See 2014 Maryland Laws Ch. 217 (H.B. 174). All parties continue to refer to this agency as the IIU.

[2] Respondent has long maintained that this amendment codified existing practice. See Opp. Br. 17-18. Petitioner, however, contends that "the 2008 amendments to the directives did not codify pre-existing practice." Cert. Reply 5.

the incident at issue here, an ARP request would be dismissed as procedurally improper if it overlapped with an IIU investigation. See Resp. Lodging 1, 16, 18, 20, 33-38.[3]

**B. Factual background.**

In June 2007, respondent Shaidon Blake was an inmate at the Maryland Reception, Diagnostic, and Classification Center. Pet. App. 3. Petitioner Michael Ross was a guard at the facility. *Ibid.*

On June 21, petitioner and another guard, James Madigan, set out to move respondent to a different cell block. Pet. App. 3. Petitioner handcuffed respondent's hands behind his back (*ibid.*); respondent did not resist (*id.* at 47). Petitioner then held respondent "in an escort grip" and proceeded to move him to his new cell. *Id.* at 3. While they were walking down concrete stairs, Madigan shoved respondent from behind, forcing respondent to push his elbow

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[3] In this submission, we rely upon briefs filed in federal court, as well as exhibits appended to those briefs, that demonstrate how the Maryland administrative remedy procedure works in actual practice. All of these documents are public records: all were filed in federal court, and the exhibits are Maryland agency adjudications. Most of these documents were filed by the Maryland Attorney General. For the Court's convenience, we have submitted a paginated lodging of this material.

The Court often cites briefs filed in prior cases when they bear on a party's current position. See, *e.g.*, *Marvin M. Brandt Revocable Trust* v. *United States*, 134 S. Ct. 1257, 1266 (2014); *Reno* v. *Bossier Par. Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000). Likewise, the Court often evaluates lodgings of analogous material. See, *e.g.*, *N.Y. Times Co.* v. *Tasini*, 533 U.S. 483, 505 n.13 (2001) (lodging of foreign court decisions); *Ohio Forestry Ass'n, Inc.* v. *Sierra Club*, 523 U.S. 726, 736 (1998) (lodging of administrative appeals).

against the railing to avoid falling down the stairs. *Ibid.* At the bottom of the stairs, Madigan shoved respondent again. *Id.* at 4. Respondent cursed at Madigan following the second shove. *Ibid.*

Despite the fact that respondent "wasn't a threat," petitioner and Madigan nonetheless chose to brutally beat respondent. JA 44. Petitioner held respondent (still in handcuffs, see *id.* at 45) against a wall while Madigan "wrapped a key ring around his fingers and then punched [him] at least four times in the face in quick succession." Pet. App. 4. The force of the blows drove respondent's head into the wall. JA 20. Petitioner did nothing to intervene and continued to hold respondent. Pet. App. 4. After a brief pause, Madigan punched respondent again. *Ibid.* Petitioner and Madigan then lifted respondent from the ground and dropped him, violently slamming his head to the ground. *Id.* at 31, 48. Petitioner also "dropped his knee onto [respondent's] chest." *Id.* at 4. Petitioner and Madigan restrained respondent until other officers arrived. *Ibid.*

Those other guards then took respondent to the medical unit. Pet. App. 4. Respondent was later diagnosed with nerve damage. *Ibid.* He continues to suffer from persistent headaches, for which he is treated with Neurontin, a nerve pain medication. JA 28, 308.

### C. The Internal Investigative Unit investigation and report.

On June 21, 2007, the very day petitioner and Madigan assaulted him, respondent lodged a complaint with prison officials. Pet. App. 4-5. His complaint named both petitioner and Madigan as wrongdoers. *Id.* at 11; JA 228-229. Respondent

claimed that Madigan punched him "about 5 good times," and petitioner "just let him do it." JA 229. During the assault, respondent asked petitioner why he would "let [Madigan] just punch me." *Ibid.* After recounting the event, respondent requested "a formal internal investigation." *Ibid.* He closed by pleading once more: "Please investigate this incident." *Id.* at 230.

In response to his complaint, the IIU initiated a year-long investigation of respondent's claims, which yielded an extensive (nearly 100-page) administrative record. Pet. App. 4-5; JA 186-260. Investigators took written statements from petitioner and Madigan (JA 23-24, 214, 216); the tier officer, Candis Fields (*id.* at 221); the first guard to arrive on the scene, Latia Woodard (*id.* at 219); the duty officer, Calvin Vincent (*id.* at 202); the shift commander, Cherie Peay (*id.* at 201); and officer Ronald Joyner (*id.* at 207). Investigators also interviewed respondent (*id.* at 169), as well as other inmates in respondent's unit (CA4 JA 66). And the investigators examined documentary evidence, including medical records (JA 243), and photographs of respondent's injuries (*id.* at 244).

Respondent understood the IIU's investigation to mean that the prison was "handl[ing]" his claim. JA 174. He testified that he did not believe that he needed to file any other grievance; as he put it, "[t]he warden instantly jumped in and involved himself." *Id.* at 173. Additionally, respondent stated that "[i]t was dealt with internally." *Ibid.*

After the IIU completed its investigation, it issued a formal, "comprehensive" report on the incident. Pet. App. 4, 31. The report made several factual findings, including that "the risk to [Madigan's]

safety was negligible at best," and that "the event could have been avoided." JA 25. The report concluded that "Madigan had used excessive force against Blake by striking him in the face while he was handcuffed." Pet. App. 4-5.

The report's findings and conclusions were confirmed by both the security chief and the prison warden. JA 25. The security chief stated that "[t]he amount of force used was not in compliance with the * * * use of force manual." CA4 JA 56. The prison warden likewise confirmed that the "[u]se of force was unnecessary [and] therefore it was excessive." *Ibid.*

As a result of the investigation, the State charged Madigan with "engaging in intentional misconduct, without justification, that seriously threatens the safety of the workplace; wantonly careless conduct in the care and custody of an inmate and excessive use of force which could reasonably be expected to result in serious bodily harm or death." JA 260-261. Madigan entered into "a settlement agreement pursuant to which he resigned in lieu of being fired." Pet. App. 32. By contrast, the "report did not assign any fault to [respondent]." *Id.* at 5. It therefore "did not recommend any disciplinary action against him." *Ibid.* Respondent, according to the prison's report, was an innocent victim.

**D. Proceedings below.**

1. In September 2009, respondent, acting *pro se*, filed this Section 1983 suit against petitioner and Madigan, contending that their use of excessive force violated his constitutional rights. Pet. App. 5, 29. Petitioner answered the complaint in November 2009 and then filed a motion requesting dismissal or

summary judgment in February 2010. *Ibid.* Petitioner did not assert an exhaustion defense at either time. *Ibid.* The district court denied petitioner's motion and appointed counsel to represent respondent. *Ibid.*

In August 2011, nearly two years after respondent filed suit, petitioner requested consent to file an amended answer. Pet. App. 5. Acknowledging that they intended to amend respondent's handwritten, *pro se* complaint, respondent's court-appointed counsel agreed that an amended answer would be appropriate. *Ibid.* Petitioner's amended answer asserted, for the first time, the affirmative defense of failure to exhaust administrative remedies. *Id.* at 5-6. The district court granted petitioner's consent motion less than a day after it was filed. *Id.* at 6. After respondent filed an amended complaint, petitioner filed another answer, again asserting an exhaustion defense. *Ibid.*

Respondent moved to strike petitioner's exhaustion defense from both answers, arguing that petitioner had waived the defense by not raising it earlier. Pet. App. 6. Petitioner responded by moving for summary judgment on the defense. *Ibid.*

The district court denied respondent's motion to strike and granted petitioner's motion for summary judgment. Pet. App. 46-61. The court first rejected respondent's waiver argument. *Id.* at 51-55. Turning to the question of exhaustion, the court found "that an internal investigation does not relieve prisoners of the PLRA's exhaustion requirement." *Id.* at 60. The court initially held that respondent failed to exhaust because he should have engaged in the IGO process (*id.* at 58); on reconsideration, the court changed course and suggested that respondent was also

obliged to pursue an ARP (*id.* at 41). The court entered judgment in petitioner's favor. *Id.* at 6.

The case proceeded to a jury trial as to Madigan (who never asserted an exhaustion defense). The jury found that "Madigan 'maliciously and sadistically' violated [respondent's] constitutional rights." JA 303. The jury awarded respondent $50,000 in damages. JA 6. The district court subsequently entered judgment in respondent's favor (*ibid.*), denied Madigan's request for a new trial (*id.* at 6-7), and awarded respondent attorneys' fees (*ibid.*).

Madigan did not appeal. Respondent appealed the district court's entry of judgment as to petitioner.

2. The court of appeals reversed. Pet. App. 1-28. Finding petitioner's exhaustion defense "without merit," the court did not address the question of waiver. *Id.* at 6.

The court reasoned that respondent had sufficiently exhausted his administrative remedies, even assuming he made a technical mistake of Maryland state law. Pet. App. 11-15. The court based that conclusion on two showings: (1) respondent had "an objectively reasonable belief that he had exhausted all available avenues for relief" (*id.* at 12 & n.4), and (2) respondent's actions caused an investigation by the prison that "exhausted his remedies *in a substantive sense* by affording corrections officials time and opportunity to address complaints internally" (*id.* at 10 (quotations omitted)). The court grounded this test in "traditional principles of administrative law," which resonated with "the purposes of the PLRA's exhaustion requirement." *Ibid.*

The court concluded that the facts of this case satisfy both requirements. As to the first, the court

found that respondent "reasonably interpreted Maryland's murky inmate grievance procedures." Pet. App. 15. The court specifically found "no basis for an inmate to conclude that the ARP and IIU processes would be permitted to proceed concurrently." *Id.* at 12.

As to the second, the court found that respondent's IIU investigation "clearly * * * satisfied the substantive component" of the test it applied. Pet. App. 11. After all, "[t]he Department conducted a one year investigation into [respondent's] violent encounter with Madigan and [petitioner], at the conclusion of which it issued Madigan an Unsatisfactory Report of Service and relieved him of his duties as a corrections officer." *Ibid.*

Judge Agee dissented. Pet. App. 16-28. In his view, respondent failed to exhaust his administrative remedies. *Id.* at 20. Judge Agee mainly quarreled with whether, in light of the facts of this case, it was objectively reasonable for respondent to believe that he complied with state law requirements. *Id.* at 22-27. His principal conclusion, therefore, was that "a reasonable interpretation exception does not excuse [respondent's] failure to exhaust" on the facts of this case. *Id.* at 27.

The court of appeals denied petitioner's request for rehearing *en banc* without calling for a response. Pet. App. 64. No member of the court of appeals requested a poll. *Ibid.* This Court subsequently granted certiorari.

## SUMMARY OF ARGUMENT

I. The question presented in the petition and addressed in petitioner's merits brief—whether the PLRA exhaustion requirement bars a lawsuit by a

prisoner who made an objectively reasonable mistake when pursuing his administrative remedies—is not presented by the facts of this case. Here, petitioner made no mistake. Because the IIU investigated the assault, respondent could not have pursued any other form of administrative relief.

In seeking certiorari, petitioner asserted that respondent could and should have pursued relief via the "administrative remedy procedure" (ARP). That is simply wrong. In fact, routine practice during the relevant period was to dismiss ARP complaints as procedurally improper when (as in this case) an IIU investigation was pending. We document five separate cases—one of which was filed on the *same day* as the assault at issue here—in which ARP complaints were found procedurally improper in these circumstances.

Petitioner now hedges, asserting that, if respondent could not have used an ARP grievance, he could have pressed his claim via an original complaint with the Inmate Grievance Office (IGO). Not only is that inconsistent with what petitioner said in the petition, it is simply incorrect. Again, we identify specific cases in which prisoners attempted to file a direct complaint in the IGO despite an IIU investigation, and each grievance was dismissed as procedurally improper.

Because respondent pressed his claim in the only way that Maryland administrative procedures allowed, the Court should either affirm on this basis or dismiss the writ of certiorari as improvidently granted.

II. If the Court reaches the question presented in the petition, it should affirm.

The PLRA requires prisoners to exhaust only those remedies that are "available." For a remedy to be "available," it must be "accessible" and "capable of use." *Booth* v. *Churner*, 532 U.S. 731, 737-738 (2001). To fairly describe an administrative remedy as "accessible" and "capable of use," it must be sufficiently clear so that an objectively reasonable prisoner would know which remedy to use and how to use it. As the courts of appeals have uniformly held, if a prison makes its administrative procedures too convoluted—that is, if it plays "hide-and-seek" with the proper remedies—they are not "available." *Goebert* v. *Lee Cty.*, 510 F.3d 1312, 1322-1323 (11th Cir. 2007).

Here, petitioner—represented by the Attorney General of Maryland—fails to identify what specific procedure he believes respondent should have used. In his merits brief, he identifies two possible grievance procedures (the ARP and the IGO), but he does not actually commit to either one. Despite this, petitioner asserts that the PLRA's exhaustion requirement applies *whenever* a prisoner makes an error, no matter how indecipherable the prison's policies and no matter how reasonable the prisoner's misstep.

No court of which we are aware has ever accepted this drastically harsh view of the PLRA—that the clarity of an administrative remedy is wholly irrelevant to determining whether it is "available." Petitioner's position, if accepted, would provide a perverse incentive for prisons to lard their administrative grievance procedures with needless complexity in an effort to trip up prisoners.

That is not, and should not become, the law. In using the term "available," Congress set a minimal, outer boundary of clarity that a prison must satisfy to gain the benefit of the exhaustion defense under

the PLRA. If a State's prison grievance procedures are clear and transparent, its administrative remedies will always qualify as "available."

## ARGUMENT

### I. Petitioner Properly Exhausted All Available Administrative Remedies.

The Court need not—and should not—resolve the question presented by petitioner. The question petitioner addresses turns on the premise that respondent failed to exhaust "available" administrative remedies; he asks this Court to resolve how the PLRA's exhaustion requirement should apply to a prisoner who made an objectively reasonable mistake.

But that question is not presented by the facts of this case. Respondent did not fail to exhaust any administrative remedy that was "available" to him.[4] The Court should affirm the judgment below on this basis. Alternatively, the Court should dismiss the writ of certiorari as improvidently granted.

#### A. Petitioner's premise that respondent failed to properly exhaust his available remedies is unequivocally wrong.

In his petition for certiorari, petitioner asserted that respondent failed to exhaust his administrative

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[4] Respondent has pressed this argument at every stage. He argued that the IIU was the proper means of exhaustion in the district court. See, *e.g.*, Pet. App. 38-42. In the court of appeals, he contended that he "exhausted his administrative remedies because the subject of his grievance was fully investigated by the Internal Investigative Unit and no further review was available." CA4 Dkt. No. 27, at 36. See also *id.* at 16; *id.* at 41 (similar). And, in opposing certiorari, respondent advanced this argument at length. See Opp. Br. i, 14-18.

remedies because he did not use Maryland's Administrative Remedy Procedure (ARP). Pet. 5-6. He argued that the "administrative remedy procedure" applies to "'*all* types of complaints,' including use of force claims like the one [respondent] raises here." *Id.* at 5. Petitioner thus faulted respondent for "never start[ing]—much less complet[ing]—the prison's simple grievance process." *Id.* at 6. Petitioner reiterated this theory, and just this theory, in his reply brief. See Cert. Reply 3-4.

Certiorari having now been granted, petitioner has changed his tune. He asserts that respondent failed to properly exhaust his remedies because he did not *either* "initiate an ARP grievance *or* file any claim directly with the Inmate Grievance Office." Pet'r Br. 10 (emphasis added). See also *id.* at 8. Thus, according to petitioner, respondent was required by the PLRA to have pursued one of those avenues for relief (he does not specify which) and—having failed to do so—has defaulted his claim.

There is an obvious problem with that position: In fact, respondent was procedurally *forbidden* from pursuing an ARP grievance or a claim before the IGO. That is because, when the Internal Investigative Unit (IIU) investigates an incident, no other administrative remedy is available to a prisoner. Petitioner's contrary understanding of Maryland law—both as framed in the petition and as petitioner sees it now—is simply wrong.

*1. To qualify as "available," an administrative remedy must have some authority to address a prisoner's complaint.*

The law as it relates to the PLRA for this purpose is clear and undisputed. The PLRA requires a

prisoner to exhaust only those remedies that are "available." 42 U.S.C. § 1997e(a). A remedy is not "available" in the statutory sense if it is a procedurally improper means of advancing a certain kind of claim.

This Court has held as much. To qualify as "available," "the administrative process" must have "authority to take some action in response to a complaint." *Booth*, 532 U.S. at 736. Conversely, exhaustion is not "required where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint." *Ibid.* "Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." *Id.* at 736 n.4.

Petitioner agrees. Under *Booth*, to be "available," the administrative process must entail "authority to take some action in response to a complaint." Pet'r Br. 33. Thus, petitioner does not shy from the conclusion that, "'if a prison provided no internal remedies, exhaustion would not be required.'" *Ibid.*

But what petitioner fails to acknowledge is that this is just such a case. In Maryland, when the IIU investigates an incident, the prison will dismiss any other administrative grievance as procedurally improper.

*2. The Administrative Remedy Procedure was not "available" to respondent.*

Petitioner's main theory of the case—and the one he advanced in his petition for certiorari—is that respondent should have pursued an ARP grievance. See Pet'r Br. 6-7, 24, 51, 55; Pet. 5-6; Cert. Reply 3-4.

In his view, it is a catchall grievance mechanism, subject to limited exceptions not applicable here.

Petitioner is wrong. Because of the IIU investigation, an ARP grievance was not available to respondent. If he had filed one, it would have been dismissed as procedurally improper.

a. State law requires that, when the IIU investigates an incident that occurred in a Maryland prison, no other inquiry may proceed in parallel. This explains why Maryland precludes a prisoner from accessing other prison administrative remedies in the face of an IIU investigation.

The IIU is the agency within the Maryland Department of Public Safety and Correctional Services responsible for investigating "[a]n alleged violation of criminal law committed by an employee while on duty" as well as "[o]ther alleged violations that have a negative impact on the Department." Md. Code Regs. § 12.11.01.03(A). In particular, the IIU must investigate "allegation[s] of excessive force by an employee." *Id.* § 12.11.01.05(A)(3).

IIU investigators have substantial authority: they may access Department facilities and records and they may compel Department employees to provide physical or testimonial evidence. Md. Code Regs. § 12.11.01.07(B). And, after the IIU begins an investigation, the IIU investigator must "[p]repare an investigative report that, at a minimum, contains (a) [c]omplete and detailed information regarding the complaint or incident; (b) [a] clear account of investigative actions; and (c) [a]ll relative information supporting the finding." *Id.* § 12.11.01.07(C)(5).

When an IIU investigation is underway, Maryland law precludes other entities within the Depart-

ment from investigating. Per regulation, after an IIU proceeding is initiated, "[a]n agency head or a designee *shall* * * * [r]elinquish authority for an investigation undertaken by the IIU, including an investigation initially assigned to an agency head, or a designee, that is subsequently assumed by the IIU." Md. Code Regs. § 12.11.01.08 (emphasis added).[5] Of course, as petitioner himself stresses (Pet'r Br. 25), the "use of a mandatory 'shall' * * * impose[s] discretionless obligations." *Lopez* v. *Davis*, 531 U.S. 230, 231 (2001).

This exclusionary provision is quite broad. The regulations define an "agency head" as "the highest authority of an agency." Md. Code Regs. § 12.11.01.02(B)(2). An "agency," in turn, is any "organization, institution, division, or unit established by statute or created by the Secretary within the Department." *Id.* § 12.11.01.02(B)(1). The regulation therefore requires all agencies within the Department to "relinquish" authority over a particular case when the IIU investigates.

b. In accordance with this regulation, on August 27, 2008 (just fourteen months after the incident at issue in this case), the Department amended Directive 185-003. JA 351-381. The amended Directive states that, when the IIU is investigating an incident, an ARP may not proceed in parallel. Section IV(N), captioned "Dismissal of a Request for Procedural Reasons" (*id.* at 364), provides:

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[5] These regulations governing the IIU went into effect on August 28, 2006, prior to the incident at issue here. See Md. Code Regs. § 12.11.01.9999. Despite citing other provisions of this Chapter, the State does not address this exclusivity provision. See Pet'r Br. 8-9.

> The Warden or institutional coordinator shall issue a final dismissal of a request for procedural reasons when it has been determined that the basis of the complaint is the same basis of an investigation under the authority of the Internal Investigative Unit (IIU).

*Id.* at 367.

We contended in the opposition brief that Directive 185-003 confirmed what had always been the practice in Maryland prisons—an IIU investigation bars a parallel ARP complaint. Opp. Br. 17-18. In reply, petitioner called our argument "unmeritorious" (Cert. Reply 3) and asserted that "the 2008 amendments to the directives did not codify pre-existing practice" (*id.* at 5). These representations were essential to petitioner's contention that the "administrative remedy procedure" was "available" to respondent. *Id.* at 3.

As we now demonstrate, petitioner is unequivocally wrong. We have conducted an exhaustive search and identified five separate cases, each decided prior to the amendment of Directive 185-003, where an ARP was dismissed as procedurally improper solely because of a parallel IIU investigation. We did not find a single case with a different outcome.

The implication of our findings—that not even the Maryland Attorney General's office can accurately describe the administrative procedures facing Maryland prisoners with meritorious claims of excessive force—is deeply troubling in its own right. But petitioner's representations on this score are all the more concerning because the defendants in all five of the cases we cite *were represented by the Maryland*

*Attorney General*. Indeed, in its briefs in many of the cited cases, the Attorney General's office recognized the point we press here—that an investigation by the "Internal Investigative Unit[] superced[es] an ARP investigation." Resp. Lodging 23-24 (Mem. at 3-4, Dkt. No. 14-1, *Wilkerson* v. *Funner*, No. 6-cv-575 (D. Md. July 14, 2006)).

**Dwayne Bacon.** On June 9, 2007 (twelve days before the incident at issue in this case), Maryland prisoner Dwayne Bacon asserted that a prison guard assaulted him. After he sued, the Maryland Attorney General filed records of Bacon's prison grievances. See Resp. Lodging 1 (Mem. Ex. 5, Dkt. No. 13-5, *Bacon* v. *Merchant*, No. 07-cv-2033 (D. Md. Feb. 27, 2008)).

Bacon filed an ARP—the very remedy that petitioner contends that respondent should have used. See Pet'r Br. 24, 51, 55. He filed his grievance on June 21, 2007, which is the same day as the assault at issue here. Resp. Lodging 1 (Mem. Ex. 5, *Bacon* v. *Merchant*, *supra*). On July 31, 2007, the prison dismissed it:

> Your Request for Administrative Remedy has been received and is hereby dismissed. This issue has been assigned to the Division of Correction's Internal Investigative Unit (Case #07-35-010621I/C), and will no longer be addressed through this process.

*Ibid.*

In its brief, the Maryland Attorney General's office recognized that the IIU investigation barred the ARP:

> On June 21, 2007 inmate Bacon filed a second grievance and it was dismissed because the issue had been assigned to DPSCS' IIU and would no longer be addressed through the ARP process.

Resp. Lodging 5 (Mem. at 4, *Bacon* v. *Merchant*, *supra*).

Bacon did exactly what petitioner says respondent should have done. He did it on the same day that respondent was assaulted. And his request was dismissed as procedurally improper.

**Austin Gladhill.** Austin Gladhill alleged that he was stabbed in the neck on June 1, 2007—twenty days before the assault in this case. See Resp. Lodging 16 (Mem. Ex. 8, Dkt. No. 33-12, *Gladhill* v. *Shearin*, No. 08-cv-3331 (D. Md. Aug. 19, 2010)). Gladhill filed an ARP complaint on June 6, 2007. *Ibid.* The prison responded tersely:

> IIU Case # 07-35-00769.

*Ibid.* And, for that reason, the institutional coordinator dismissed Gladhill's ARP the same day:

> This matter has been referred to the IIU, as such no further action will be taken thru the ARP.

*Ibid.*

On July 3, 2007, Gladhill appealed, asserting that the IIU proceeding was unrelated to his ARP. See Resp. Lodging 17 (Mem. Ex. 8, *Gladhill* v. *Shearin*, *supra*). On July 13, 2007, the ARP headquarters coordinator dismissed Gladhill's appeal:

> Appeal of admin dismiss and concur w/ ARC. Therefore your appeal is admin. dismissed—FINAL.

*Ibid.*

Like Bacon, Gladhill did exactly what petitioner asserts respondent should have done. He did it at the same time. And his ARP was dismissed as procedurally improper.

**Joseph Wilkerson.** Maryland prisoner Joseph Wilkerson also filed an ARP, asserting that prison guards assaulted him. Resp. Lodging 18 (Compl. Ex. 1, Dkt. No. 1, *Wilkerson* v. *Funner*, No. 06-cv-575 (D. Md. Mar. 6, 2006)). On January 25, 2006, the coordinator dismissed the complaint:

> Admin. Dismiss Final: This is being investigated outside of the ARP process by I.I.U.

*Ibid.*

In that case, the Attorney General's office recognized that "Wilkerson filed an ARP request," but "his complaint already was being investigated by the Department of Public Safety and Correctional Service's Internal Investigative Unit, *superceding an ARP investigation.*" Resp. Lodging 23-24 (*Wilkerson* v. *Funner*, *supra*) (emphasis added).

**Micheal Wagner.** Maryland prisoner Micheal Wagner filed an ARP grievance. The prison dismissed it on March 8, 2006:

> Your request for administrative remedy has been dismissed. An investigation has revealed that your complaint is currently under investigation by IIU. Your case# is I/C 06-35-00280.

Respondent's Lodging 33 (Mem. Ex. 7, Dkt. No. 31-7, *Wagner* v. *Galley*, No. 06-cv-1130 (D. Md. Dec. 1, 2006)).

**Wayne Green.** Maryland prisoner Wayne Green filed an ARP in 2002. See Respondent's Lodging 34 (Mem. Ex. 5, Dkt. No. 12, *Green* v. *Sacchet*, No. 02-1835 (D. Md. Aug. 30, 2002)). The prison dismissed it:

> This matter has been referred to the Internal Investigation Unit. As such, no further action will be taken on this issue through the Administrative Remedy Procedure.

*Ibid.*

We have painstakingly sifted through years of prison litigation documents in the U.S. District Court for the District of Maryland. These are the only five cases, prior to the amendment of Directive 185-003, that we have uncovered where an inmate attempted to bring an ARP grievance notwithstanding an IIU investigation.[6] In each case, the ARP was dismissed

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[6] It is unclear whether a prisoner can pursue an ARP grievance *after* an IIU investigation concludes. That issue is irrelevant here, however: when the IIU investigation concluded more than a year after the incident (JA 190), the ARP's 15-day limitations period had long since elapsed. *Evans*, 914 A.2d at 69.

In any event, it appears that an IIU investigation forever forecloses a separate ARP or IGO investigation. That is the natural reading of Md. Code Reg. § 12.11.01.08(B), and amended Directive 185-003 instructs a prison to provide the unconditional message that, "[s]ince this case shall be investigated by IIU, no further action shall be taken within the ARP process." JA 368. Maryland would have good reason to adopt this structure: principles of comity, efficiency, and finality counsel in favor of a single adjudication. Parallel investigations risk inconsistent results.

as procedurally improper. Again, we found no cases with different outcomes.[7]

These cases are conclusive. Petitioner's assertion before this Court—that IIU investigations are "entirely separate" from the "administrative remedy procedure" and can proceed in parallel (Pet'r Br. 9)—is indefensible. As respondent has insisted all along, had he filed an ARP grievance, it would have been dismissed as procedurally improper.[8]

Following the amendment of Directive 185-003, Maryland prisons have continued to dismiss an ARP whenever it is parallel to an IIU investigation. We have identified thirty opinions, written by twelve separate judges, holding that, when the IIU investigates, no other administrative remedy is available.[9] In fact, this sort of dismissal is so common that Maryland prisons often use a rubber stamp to dis-

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[7] Of course, even if petitioner could locate counterexamples, it would only show that the grievance system was so confusing that prison officials did not know how to administer it—or that the system was administered arbitrarily.

[8] If an administrative procedure is the proper means to pursue some claims but an improper means as to others, it is not "available" with respect to the latter category of claims. See *Booth*, 532 U.S. at 736 & n.4. It would be doublespeak to assert that, to "properly exhaust" a claim (*Woodford*, 548 U.S. at 101), a prisoner must use a procedure that the prison itself says is improper.

[9] See, *e.g.*, *Manzur* v. *Daney*, 2015 WL 1962182, at *3 (D. Md. 2015); *Chase* v. *U.S. Dist. Court of Maryland*, 2015 WL 1817240, at *3 (D. Md. 2015); *Miller* v. *Fisher*, 2015 WL 1402323, at *4 (D. Md. 2015); *Chew* v. *Green*, 2014 WL 4384259, at *13 (D. Md. 2014); *Oliver* v. *Harbough*, 2011 WL 6412044, at *4 (D. Md. 2011). See also, *infra*, pages 28-29 & nn.11-13.

miss ARP complaints on this basis. Resp. Lodging 35, 36, 37, 38.[10]

*3. The Inmate Grievance Office was not "available" to respondent.*

Perhaps anticipating these problems, petitioner contends as a fallback that, "[i]f the administrative remedy procedure is not available for a particular type of claim, an inmate may file a grievance directly with the Inmate Grievance Office." Pet'r Br. 8. Petitioner did not advance this argument in his petition for certiorari; at that time, his position was that the ARP was an exclusive, "comprehensive, easy-to-understand administrative system." Pet. 5. See also Cert. Reply 3-4. He described the IGO solely as an *appellate* venue. Pet. 5-6.

Petitioner is wrong once again. A direct complaint with the IGO was not an alternative administrative remedy that respondent could have used to pursue his claim.

a. To begin with, petitioner's IGO argument scuttles his principal theory of the case—that all respondent had to do was to follow the steps laid out in the prison handbook. See Pet'r Br. 7. Petitioner asserts that the handbook "summarizes the procedures in layman's terms" (*ibid.*) and "plainly states" the method for exhausting a claim (Cert. Reply 4). But *nothing* in the handbook instructs an inmate whether or when to bypass the ARP and "file a grievance directly with the Inmate Grievance Office." Pet'r Br.

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[10] It does not matter *who* initiates the IIU investigation. When the warden "convened a formal investigation into the incident," the IIU process nonetheless foreclosed an ARP. *Grimes* v. *Warden*, 2012 WL 2575373, at *4 (D. Md. 2012).

8. Instead, the handbook (like the petition for certiorari) treats the IGO as solely the *appellate* body for an ARP. It expressly conditions the filing of an IGO complaint on the completion of the ARP process: "[t]he IGO *reviews* grievances and complaints of inmates against the Division of Correction * * * *after* the inmate has exhausted institutional complaint procedures, such as the Administrative Remedy Procedure." Pet. App. 78 (emphasis added).

b. Moreover, the IIU exclusivity provision applies with full force to the IGO. As we have explained, all other agencies within the Maryland Department of Public Safety and Correctional Services must "[r]elinquish authority for an investigation undertaken by the IIU." Md. Code Regs. § 12.11.01.08. The IGO is an agency within the Department and is thus subject to this regulation. See Md. Code Ann., Corr. Servs. § 10-202 ("There is an Inmate Grievance Office in the Department."). See also Pet'r Br. 7 (the IGO is "within the Department").

c. Beyond that, petitioner's assertion that respondent could have brought an original complaint with the IGO is belied by the IGO's own exhaustion requirement. The IGO requires that, "[i]f the administrative remedy procedure applies to a particular situation or occurrence, the grievant shall properly exhaust the administrative remedy procedure before filing a grievance with the Office." Md. Code Regs. § 12.07.01.02(D). On multiple occasions, the IGO has understood this regulation to foreclose a prisoner from bringing a direct complaint in the IGO, *even when* that prisoner's ARP had already been dismissed as procedurally improper in light of an IIU investigation.

As we described earlier, prior to the amendment of Directive 185-003, Joseph Wilkerson's ARP was dismissed on the basis of a parallel IIU investigation. See, *supra*, page 21. After this dismissal, Wilkerson filed an original grievance with the IGO, alleging "[a]ssault by [o]fficers." Resp. Lodging 19 (Mem. Ex. 2, Dkt. No. 14-2, *Wilkerson* v. *Funner*, *supra*).

On January 10, 2006, Paula Williams, the Associate Director of the IGO, "administratively dismiss[ed]" the complaint because it was "one which must first be presented through the Administrative Remedy Procedure (ARP)." *Ibid.* Wilkerson followed the IGO's instruction to file a second ARP grievance. *Id.* at 20. Like the first, it was also dismissed as procedurally improper:

> Admin. Dismiss Final. Your complaint is outside of the ARP process and you must direct your issue to IIU through Case #05-35-001434.

*Ibid.*

This was nothing more than a shell game. Wilkerson filed an ARP grievance, and it was dismissed as procedurally improper. He filed an original IGO grievance, which was dismissed as procedurally improper. He followed the IGO's direction to refile an ARP, which was *also* dismissed as procedurally improper.

For its part, the Attorney General's office plainly recognized that Wilkerson had no administrative remedy beyond the IIU:

> Wilkerson sought to complain about the incident to the Inmate Grievance Office, which advised him that he must first present his

> complaint through the administrative remedy procedure ("ARP"). *See* Exhibit 1 at pages 36-38. Wilkerson filed an ARP request. However, his complaint already was being investigated by the Department of Public Safety and Correctional Service's Internal Investigative Unit, *superceding an ARP investigation. Id* at 38.

Resp. Lodging 23-24 (Mem. at 3-4, Dkt. No. 14-1 *Wilkerson* v. *Funner*, *supra*) (emphasis added).

The IGO treated an original complaint by Donald Pevia the same way. Pevia's ARP was dismissed based on a parallel IIU investigation: the "IIU was notified regarding this incident," and thus "your case has been dismissed." Resp. Lodging 41 (Mem. Attach., *Pevia* v. *Shearin*, No. 13-cv-2912 (D. Md. May 12, 2014)).

While the appeal of his ARP dismissal was pending, Pevia did what petitioner now suggests respondent could have done—he filed a complaint directly with the IGO, bypassing the ARP system. He did so, he explained, because he did not know if it was necessary to preserve his rights:

> I am filing this Complaint against [prison] staff. I have followed all A.R.P remedies[.] Warden and then A.R.P. Appeal to the Commissioner. * * * I do not know if I was suppose to wait for a final response from them. So I just went to I.G.O. to cover my back before my deadline would expire.

Resp. Lodging 39-40 (Mem. at Attach., *Pevia* v. *Shearin*, *supra*). In filing this original complaint, Pevia enclosed his ARP denial. *Ibid.*

But the IGO dismissed Pevia's original complaint on failure-to-exhaust grounds. Resp. Lodging 42-43 (Mem. at Attach., *Pevia* v. *Shearin*, *supra*). Paula Williams found that "this grievance is premature because you failed properly to exhaust the ARP process before filing this grievance, in violation of COMAR 12.07.01.02(D)." *Id.* at 43. She concluded, moreover, that "the exhaustion requirement has not been waived for good cause shown." *Ibid.* Thus, notwithstanding that Pevia had documented to the IGO that the ARP process was unavailable to him because of the IIU investigation, the IGO dismissed an original complaint as procedurally improper.

d. Finally, consistent practice in the District of Maryland forecloses petitioner's assertion—made without evidence or example—that respondent could have filed a complaint directly with the IGO. Following the amendment to Directive 185-003, dozens of cases have held that, when the IIU investigates, *no* other administrative remedy remains available.

- "Plaintiff's claim was referred to the IIU, therefore, the administrative processing of that ARP ceased. There were no further remedies available to Plaintiff once the IIU began its investigation of his claim of excessive force."[11]
- "This court is familiar with the Division of Correction's practice to decline an investigation for an ARP where one is already pending before the IIU. Thus, the court concludes that the exhaustion requirement regarding the al-

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[11] *Shiheed* v. *Shaffer*, 2015 WL 4984505, at *3 (D. Md. 2015). See also *Shiheed* v. *Fann*, 2014 WL 883958, at *5 (D. Md. 2014).

leged excessive use of force is satisfied where, as here, the administrative procedure may be unavailable."[12]

- "The court is aware that once a claim of excessive force is referred to IIU no further administrative remedy proceedings may occur."[13]

In these cases, the district court repeatedly held that an IIU investigation precluded *any* administrative remedy. If filing a direct complaint with the IGO were in fact an administrative remedy available to prisoners in these circumstances, one would expect the state lawyers who litigate these matters on a daily basis to make that exhaustion argument. They do not.

For all of these reasons, petitioner is simply wrong to speculate, without any concrete authority, that respondent could have pursued his claim via an original complaint with the IGO. See Pet'r Br. 8. Had he done so, the State's practices at the relevant time show that the complaint would have been dismissed as procedurally improper. Nor was there any handbook, directive, or other written policy instructing

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[12] *Green* v. *Pritts*, 2015 WL 4671327, at *4 (D. Md. 2015). See also *Cooper* v. *Brinegar*, 2015 WL 5288379, at *8 n.17 (D. Md. 2015); *Skinner* v. *Ibeadogbulem*, 2015 WL 736684, at *4 n.2 (D. Md. 2015); *Horner* v. *Corcoran*, 2015 WL 1736667, at *8 (D. Md. 2015); *Crudup* v. *Englehart*, 2014 WL 3563625, at *5 (D. Md. 2014); *Lynch* v. *Kenion*, 2014 WL 4406672, at *5 (D. Md. 2014); *Calhoun-El* v. *Bishop*, 2014 WL 6713112, at *9 (D. Md. 2014).

[13] *Kitchen* v. *Ickes*, 2015 WL 4378159, at *8 (D. Md. 2015). See also *Young* v. *Webb*, 2014 WL 2772815, at *13 n.10 (D. Md. 2014). Several other decisions used similar language.

inmates to bypass the ARP and file directly with the IGO for this kind of claim.

* * *

Finally, petitioner misses the point when he asserts that the IIU does not qualify as an administrative remedy because it "does not have any authority to remedy a prisoner's complaint." Pet'r Br. 8.[14] The fact of the matter is, an IIU investigation occurred. If an IIU investigation is an "administrative remedy," respondent undeniably exhausted it. If it was not, then no administrative remedy was "available" at all.

What matters is that the IIU investigation barred respondent from pursuing his claim in the way that petitioner posits he should have—via the traditional ARP proceeding as well as via an original complaint with the IGO. This is not a case where a prisoner failed to make use of an "available" administrative remedy.[15]

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[14] The Court has eschewed any rigid definition of what qualifies as an administrative remedy; it has said that the procedure need not provide a prisoner the precise remedy he seeks, such as compensation. See *Booth*, 532 U.S. at 736.

[15] It is not our position that any prison disciplinary investigation in any state satisfies the PLRA exhaustion requirement. Contra Pet'r Br. 52; U.S. Br. 21. Maryland has made the deliberate choice to treat its disciplinary investigation system as *preclusive* of any other administrative remedy. This says nothing about other prison systems that permit disciplinary investigations to coexist with grievance procedures. Cf. *Pavey* v. *Conley*, 663 F.3d 899, 905 (7th Cir. 2011); *Panaro* v. *City of N. Las Vegas*, 432 F.3d 949, 953 (9th Cir. 2005); *Thomas* v. *Woolum*, 337 F.3d 720, 734 (6th Cir. 2003).

### B. The Court should either affirm on this basis, or it should dismiss the writ of certiorari as improvidently granted.

In circumstances like these, the Court should either affirm the judgment of the court of appeals on these alternative grounds, or it should dismiss the writ of certiorari as improvidently granted.

1. The Court may always rest on "alternative grounds for affirmance." *United States* v. *Tinklenberg*, 131 S. Ct. 2007, 2017 (2011). Indeed, it "'is well accepted' that the respondent may * * * 'rely upon any matter appearing in the record in support of the judgment.'" *Union Pac. R. Co.* v. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 80 (2009). See also *Brown* v. *Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2743 n.1 (2011) (Alito, J., concurring in the judgment) ("It is well established that a judgment may be affirmed on an alternative ground that was properly raised but not addressed by the lower court.").

Here, respondent either exhausted the administrative remedy that was "available" (the IIU investigation) or no remedy was "available" at all. Either way, respondent did not fail to exhaust any "available" remedy; petitioner is not, therefore, entitled to dismissal of this lawsuit on failure-to-exhaust grounds.

This is especially so insofar as the burden of proof rests with petitioner. "[F]ailure to exhaust is an affirmative defense under the PLRA," and a prisoner need not "specially plead or demonstrate exhaustion in their complaints." *Jones* v. *Bock*, 549 U.S. 199, 216 (2007). "Ordinarily, it is incumbent on the defendant to plead and prove such a defense." *Taylor* v.

*Sturgell*, 553 U.S. 880, 907 (2008) (citing *Jones*). Every court of appeals has understood *Jones* to place the burden on the defendant who invokes an exhaustion defense.[16]

We have conclusively demonstrated that respondent did everything Maryland law required of him. Of course, because he bears the burden, petitioner "loses if the evidence is closely balanced." *Schaffer* ex rel. *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005). Since the evidence here is entirely one-sided, it follows that petitioner has failed to prove that he is entitled to the exhaustion defense. This straightforward conclusion should dispose of this case.

2. Alternatively, the Court should dismiss the writ of certiorari as improvidently granted. Such dismissals are appropriate where, as here, "the question framed in the petition for certiorari is not in fact presented by the record." *Belcher* v. *Stengel*, 429 U.S. 118, 119 (1976). Dismissal of a petition as improvidently granted may be appropriate when, in other words, "[d]ecision of the question upon which certiorari was granted [is] unnecessary because the judgment below was clearly correct on another ground." Stephen M. Shapiro, et al., Supreme Court Practice 362 (10th ed. 2013). That is the case here.

While dismissal would be appropriate for this reason alone, additional factors counsel in favor of

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[16] See, *e.g.*, *Hubbs* v. *Suffolk Cty. Sheriff's Dep't*, 788 F.3d 54, 59 (2d Cir. 2015); *Moore* v. *Bennette*, 517 F.3d 717, 725 (4th Cir. 2008); *Davis* v. *Hernandez*, 798 F.3d 290, 294-295 (5th Cir. 2015); *Lee* v. *Willey*, 789 F.3d 673, 677 (6th Cir. 2015); *Maddox* v. *Love*, 655 F.3d 709, 720 (7th Cir. 2011); *Porter* v. *Sturm*, 781 F.3d 448, 451 (8th Cir. 2015).

dismissing the writ of certiorari as improvidently granted.

*First*, the petition for certiorari made several representations concerning the contours of Maryland law that simply do not withstand scrutiny. Petitioner asserted, for example, that, "if [respondent] had followed the prison's normal grievance procedure [through the ARP], he would have had the opportunity to request other relief, including monetary compensation." Cert. Pet. 6-7. In his reply brief, petitioner labeled our contrary description of the relationship between the IIU and the ARP "unmeritorious." Cert. Reply 3. And he doubled down on his assertion that the "administrative remedy procedure" was "available" to respondent. *Id.* at 3-4.

There is no longer any doubt that those assertions are wrong. The cases we have uncovered—all litigated by the Attorney General's office itself—uniformly demonstrate how the administrative remedy process actually worked. When, as here, the "grant of the writ of certiorari * * * was predicated on [a] mistaken representation," dismissal is appropriate. *Bostic* v. *United States*, 402 U.S. 547, 548 (1971).

*Second*, dismissal is appropriate where, as here, the alternative ground is a question of state law. See *Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963) (dismissing where the "controversy * * * primarily implicates questions of Pennsylvania law and presents no federal question of substance"). At bottom, this is a disagreement about what Maryland law actually required.

And, *finally*, the decision below has no prospective importance. In light of Directive 185-003, Maryland can no longer make the exhaustion argument

that it advances in this case. But if the approach taken by the court of appeals is employed again—in a case where the facts make that legal holding relevant—the Court can review the issue at that time.

## II. The Relevant Administrative Procedure Is Too Indecipherable To Be "Available."

If the Court nonetheless reaches the question presented in the petition, it should affirm. An administrative remedy is not "available" within the meaning of the PLRA if an objectively reasonable prisoner would not know which procedure to use or how to use it.

That describes this case. In the interval between filing his petition for certiorari and filing his brief on the merits, petitioner has revised his theory of what he believes respondent should have done to exhaust his claim. In the petition, he asserted that respondent failed to exhaust because he did not file a complaint via the ARP See Cert. Pet. 5-6; Cert. Reply 3-4. Now, in his merits brief, petitioner asserts that respondent failed to exhaust because he did not "initiate an ARP grievance *or* file any claim directly with the Inmate Grievance Office." Pet'r Br. 10 (emphasis added).

Even with the benefit of counsel from the Maryland Attorney General's Office, petitioner cannot tell this Court with precision and conviction what it is that respondent should have done. That is proof positive that the grievance procedures facing respondent at the time were so objectively unclear as to be "unavailable" within the meaning of the PLRA.

Against this backdrop, the legal rule petitioner seeks is nothing short of incredible. Despite his own hedging, petitioner contends that, if respondent

picked the wrong administrative procedure during the fifteen-day window the State afforded him to file an administrative claim, he should be forever barred from federal court. According to petitioner, all that matters is whether a particular remedy *exists*—the opacity of the administrative procedure is, in his view, irrelevant. Pet'r Br. 34, 38.

That is not, and should not become, the law. The PLRA is not a license for prisons to craft convoluted administrative procedures, leaving prisoners to guess at the proper remedies for a particular claim, and to then bar lawsuits by prisoners who guess wrong.

In *Woodford*, this Court intentionally left open the prospect that, if a prison "create[s] procedural requirements for the purpose of tripping up all but the most skillful prisoners," the administrative remedy is not available. *Woodford* v. *Ngo*, 548 U.S. 81, 102 (2006). That is a correct statement of law under the PLRA. As Chief Judge Ed Carnes later wrote for the Eleventh Circuit, a prison may not "play hide-and-seek with administrative remedies": to qualify as "available," a prisoner must be able to "discover through reasonable effort" the correct procedure to use. *Goebert*, 510 F.3d at 1322-1323.

### A. For a remedy to be "available," an objectively reasonable prisoner must be able to understand how to use it.

"The inquiry begins with the statutory text," and it "ends there" when, as here, "the text is unambiguous." *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 177 (2004). A prison administrative remedy is "available" only if an objectively reasonable prisoner would know *which* remedy to use and *how* to use it.

Every court of appeals to have considered the issue agrees. And despite the fact that we made this argument in the brief in opposition to certiorari (Opp. Br. 30-32), petitioner offers no meaningful response.

1. Section 1997e(a) directs that a prisoner must exhaust those "administrative remedies" that are "available." As this Court has held, the word "available" as used in this statute means "'capable of use for the accomplishment of a purpose'" and "that which 'is accessible or may be obtained.'" *Booth*, 532 U.S. at 737-738 (quoting Webster's Third New International Dictionary 150 (1993)).

In *Booth*, the Court addressed the extent to which the *adjudicator* must be authorized to provide relief in order for the administrative remedy to be "available." As the Court explained, for an administrative remedy to be "available," that "presuppose[s]" that there is "some redress for a wrong." *Id.* at 736. If "administrative officers * * * have no authority on the subject of the complaint," no remedy is available, "leaving the inmate with nothing to exhaust." *Id.* at 736 n.4.

This case involves a different facet of what it means for an administrative remedy to be "available." It is the issue on which this Court expressly reserved judgment in *Woodford*: how the PLRA exhaustion requirement applies in a situation where a prison creates procedural requirements that are so convoluted and opaque that no one would know how to use them. See 548 U.S. at 102.

The answer to that question is straightforward. For an administrative remedy to be fairly described as "capable of use for the accomplishment of a purpose" or "that which is accessible," prisoners must be

able to decipher how to use it. If a prison's administrative procedure is so perplexing that a prisoner can do no more than guess, the remedy is not "available."

As the lower court essentially recognized—albeit without couching it in the statutory text (see Pet. App. 10)—the test for this inquiry is whether an objectively reasonable prisoner would understand the grievance procedure. "Objective reasonableness," of course, is a standard well known and frequently applied in a broad range of legal questions; it considers what is reasonable against the relevant facts and circumstances. See, *e.g.*, *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (Fourth and Fourteenth Amendments); *J.D.B.* v. *North Carolina*, 131 S. Ct. 2394, 2404 (2011) (tort law); *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011) (Fair Labor Standards Act).

The Court need not take our word for it. Like us, the United States takes the position that "prisons" do not "have *carte blanche* to adopt procedural requirements that are designed to 'trip[] up all but the most skillful prisoners.'" U.S. Br. 21 (quoting *Woodford*, 548 U.S. at 102). The United States thus proposes the very same rule that we here advance:

> If grievance procedures are so bewildering that no reasonable prisoner could discern them, or are an endless morass reminiscent of *Bleak House*, then an administrative remedy would not be "available" and a prisoner would not need to exhaust.

*Ibid.* That is surely correct. If an objectively reasonable prisoner could not discern the relevant grievance

procedure, it is not an "available" administrative remedy.[17]

The text of Section 1997e(a) allows no other result. If an objectively reasonable prisoner would not know what administrative remedy to use or how to use it, no one would describe that remedy as "capable of use" or "accessible." A remedy that is too convoluted is not one that is "available" for purposes of the PLRA.

The question in this case is not, therefore, whether respondent "properly exhaust[ed]" his administrative remedies. *Woodford*, 548 U.S. at 101. It is whether any administrative remedy that respondent did not use was "available" at all, within the meaning of the statute.

2. Petitioner's argument to this Court is, in actuality, a sly attempt to undo nearly two decades of consistent holdings by the courts of appeals. The lower courts have broadly agreed that administrative remedies must be sufficiently clear to an objectively reasonable prisoner to count as "available."

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[17] The United States supports petitioner because it understandably takes as given the Maryland Attorney General's recitation of Maryland's prison administrative procedures. See U.S. Br. 4-5. That is how the United States concludes that respondent "failed to properly exhaust administrative remedies that were available to him." *Id.* at 7. We have shown this to be wrong. At the very least, if any administrative procedure can qualify as "bewildering," this must be it. See Charles Dickens, *Bleak House* 104 (Barnes & Noble 2005) (1853) ("'[Y]ou don't understand this Chancery business?' And of course I shook my head. 'I don't know who does,' he returned. 'The Lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth.'").

Chief Judge Ed Carnes's opinion for the Eleventh Circuit in *Goebert* is but one example. There, he explained that "[i]t is difficult to define 'such remedies as are available' to an inmate in a way that includes remedies or requirements for remedies that an inmate does not know about, and cannot discover through reasonable effort by the time they are needed." *Goebert*, 510 F.3d at 1322 (quoting 42 U.S.C. § 1997e(a)). He thus resolutely rejected the same argument advanced by petitioner here, "that any remedy that is in place is 'available' to the inmate even if the inmate does not know, and cannot find out, about it." *Ibid.* "That argument," Chief Judge Carnes explained, "could have been inspired by the Queen of Hearts' Croquet game, since there is nothing on this side of the rabbit hole to support it." *Ibid.* He summed up:

> If we allowed jails and prisons to play hide-and-seek with administrative remedies, they could keep all remedies under wraps until after a lawsuit is filed and then uncover them and proclaim that the remedies were available all along. The Queen would be proud.

*Id.* at 1323. Elsewhere, the Eleventh Circuit stated our argument in a nutshell: "[r]emedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes and so are not available." *Turner* v. *Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008).

Writing for the Ninth Circuit, Judge N.R. Smith expressly adopted the reasoning of *Goebert*. See *Albino* v. *Baca*, 697 F.3d 1023, 1037 (9th Cir. 2012). The Third Circuit has similarly explained that "[r]emedies that are not reasonably communicated to inmates may be considered unavailable for exhaus-

tion purposes." *Small* v. *Camden Cty.*, 728 F.3d 265, 271 (3d Cir. 2013). In *Brown* v. *Croak*, 312 F.3d 109, 111 (3d Cir. 2002), it was accepted that a prisoner failed to comply with an administrative procedure, but the Third Circuit held that "the formal grievance proceeding * * * was never 'available'" because the prison staff misled the prisoner as to the status of the investigation and thus rendered the proper exhaustion procedure unclear. *Id.* at 113.

For the Seventh Circuit, Judge Sykes explained that "if prison officials misled [a prisoner] into thinking that by participating in the internal-affairs investigation, he had done all he needed to initiate the grievance process," then "[a]n administrative remedy is not 'available,' and therefore need not be exhausted." *Pavey* v. *Conley*, 663 F.3d 899, 906 (7th Cir. 2011). See also *Dole* v. *Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) ("[P]rison authorities may not employ their own mistake to shield them from possible liability, relying upon the likelihood that a prisoner will not know what to do when a timely appeal is never received.").

Likewise, as the Fifth Circuit held, "[g]rievance procedures are unavailable to an inmate if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process." *Davis* v. *Hernandez*, 798 F.3d 290, 295 (5th Cir. 2015). See also *Dillon* v. *Rogers*, 596 F.3d 260, 268 (5th Cir. 2010) ("We have long recognized the importance of ensuring that inmates have avenues for discovering the procedural rules governing their grievances."); *Toomer* v. *BCDC*, 537 F. App'x 204, 206 (4th Cir. 2013) (unclear instructions rendered further remedies unavailable).

It is not just active "interference" by prison staff, like refusal to provide complaint forms (Pet'r Br. 34 & n.9), that can render a prison remedy unavailable. If a reasonable prisoner does not know which procedure to use or how to use it, the remedy is not "available." It makes no difference whether a prison trips up prisoners by crafting a confusing system or by misleading prisoners about the system's rules. The fundamental principle is the same: a remedy "which is unknown and unknowable is unavailable." *Goebert*, 510 F.3d at 1323.

To be sure, the lower court did not couch its decision in terms of the statutory word "available." It instead invoked "traditional principles of administrative law" to conclude that "an uncounseled inmate attempting to navigate the grievance system will not be penalized for making a reasonable, albeit flawed, attempt to comply with the relevant administrative procedures." Pet. App. 10. And, ultimately, it considered what an "objectively reasonable" prisoner would understand in the circumstances. *Id.* at 12 n.4.

That is the same standard that we advance here. Whether or not the rule is articulated as one stemming from the plain meaning of the word "available" or from traditional principles of administrative law is a distinction without a substantive difference. All courts of appeals to address the issue uniformly agree that the "availability" prong under the PLRA is not satisfied when "prisons * * * play hide-and-seek with administrative remedies." *Goebert*, 510 F.3d at 1323.

Petitioner, by contrast, is of the view that the clarity of a state's administrative procedures is *irrelevant* in assessing whether a particular remedy is "available." See Pet'r Br. 34, 38. That drastic inter-

pretation of the PLRA finds no support whatsoever in the courts of appeals.[18] The Court should reject petitioner's attempt at fundamentally upsetting otherwise-settled PLRA principles.

3. Notwithstanding our showing in the opposition brief that this case is properly viewed as turning on the meaning of the term "available" (Opp. Br. 30-32), petitioner has exceedingly little to say about this express limitation on the scope of the exhaustion requirement. See Pet'r Br. 33-34.

Petitioner first asserts that, "to determine whether a particular administrative remedy must be exhausted, Congress directed courts to 'focus solely' on whether that remedy is available." Pet'r Br. 33. But that sidesteps the real question—*what* remedies qualify as "available." Petitioner never proposes a meaningful interpretation of this key term.

Petitioner contends that "the term 'available' does not contain a subjective element that would hinge on the inmate's belief as to the existence, accessibility, or necessity of compliance with such remedy." Pet'r Br. 33. On this point, at least, we have

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[18] None of the authority cited by petitioner defines the term "available" in a way at odds with our argument. See Pet'r Br. 32 & n.8. In *Gonzalez* v. *Seal*, 702 F.3d 785, 788 (5th Cir. 2012), the Fifth Circuit did not decide what qualifies as "available administrative remedies." *Chelette* v. *Harris*, 229 F.3d 684, 688 (8th Cir. 2000), rejected crafting an exhaustion exception for "a prisoner's *subjective* beliefs, logical or otherwise." But *Chelette* also did not address what constitutes an "available" remedy, and we do not argue that a prisoner's *subjective* view is relevant. *Nyhuis* v. *Reno*, 204 F.3d 65, 73 (3d Cir. 2000), and *Alexander* v. *Hawk*, 159 F.3d 1321, 1328 (11th Cir. 1998), rejected a futility or inadequacy exception, but did not reject the argument we advance here.

common ground: nothing in our argument suggests that an inmate's subjective belief is a sufficient basis to render a prison remedy "unavailable." Of course a prisoner cannot make a self-serving statement that he was confused and, on that basis alone, avoid the exhaustion requirement.

Petitioner recognizes, and even appears to endorse, the decisions of the courts of appeals that hold an administrative remedy is not "available" if the prison staff precludes the prisoner from using it. Pet'r Br. 34 & n.9. But petitioner does not attempt to fit this law into a unified understanding of what he believes the term "available" to mean. Our view of the law, by contrast, is consistent: a remedy is not "available" if an objectively reasonable prisoner cannot use it. That may be because the system is too bewilderingly complex for a prisoner to figure out the correct procedure. Or it may be because prison staff engages in activity that would preclude an objectively reasonable prisoner from using that procedure.

Finally, petitioner twice repeats his fact-based contention that "[i]t is beyond reasonable dispute that the administrative remedy process was available to" respondent because the grievance authority could "'take some action in response to a complaint.'" Pet'r Br. 33. See also *id.* at 34-35. We have shown that these representations are false. See, *supra*, pages 15-30. In any event, this is nonresponsive to our *legal* argument as to what the word "available" means in Section 1997e(a).

### B. Habeas and administrative exhaustion principles confirm this understanding of "available."

To the extent that the meaning of "available" admits of any ambiguity—we submit that there is none—habeas and administrative law confirm our understanding of the PLRA's exhaustion regime. Because "[e]xhaustion is an important doctrine in both administrative and habeas law," this Court often "look[s] to those bodies of law for guidance" in construing the PLRA. *Woodford*, 548 U.S. at 88.

Petitioner argues that "[t]he language of the PLRA * * * does not admit of a reasonable belief exception or, for that matter, any other judicially-created exceptions" because, "[t]o comply with the statute, if administrative remedies are *available*, a prisoner must exhaust them." Pet'r Br. 25 (emphasis added). But that argument fails to appreciate the point—well established by this Court—that understanding what remedies qualify as "available" is a task that must look, when necessary, to the habeas and administrative analogs to the PLRA. *Woodford*, 548 U.S. at 93.

1. Habeas law supports our interpretation of the PLRA's exhaustion requirement. "The law of habeas corpus has rules that are substantively similar" to the PLRA's exhaustion requirement. *Woodford*, 548 U.S. at 88, 92. Section 2254, for example, uses the same crucial term, "available," as the PLRA. It requires an applicant to "exhaust[] the remedies *available* in the courts of the State" or show that there is "an absence of *available* State corrective process." 28 U.S.C. § 2254(b)(1) (emphasis added).

Like a PLRA plaintiff, a habeas applicant must typically comply with all procedural requirements established by a state; this "procedural default" doctrine is "'similar in purpose and design'" to PLRA exhaustion. *Woodford*, 548 U.S. at 92-93. But the procedural default rule does not apply "where a prisoner is impeded or obstructed in complying with the State's established procedures." *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1318 (2012). This generally requires a showing of "cause and prejudice," which "must be something *external* to the [applicant], something that cannot fairly be attributed to him." *Coleman* v. *Thompson*, 501 U.S. 722, 753 (1991).

A complex or opaque state procedural requirement can constitute such cause. The Court has long held that "'[t]he exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the (alternatives) is appropriate or effective.'" *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971) (quoting *Marino* v. *Ragen*, 332 U.S. 561, 568 (1947) (Rutledge, J., concurring)). Indeed, the Court has "held that state prisoners do not have to invoke extraordinary remedies when those remedies are alternatives to the standard review process and where the state courts have not provided relief through those remedies in the past." *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844 (1999).

Thus, a habeas "petitioner does not have to participate in a guessing game as to whether the chosen form of state action was the proper one." *Mayfield* v. *Ford*, 664 F. Supp. 1285, 1287 (D. Neb. 1987). See also *Carter* v. *Estelle*, 677 F.2d 427, 446-447 (5th Cir.

1982) (exhaustion not required where the state's procedures "are so cumbersome, complex, and confusing that they frustrate good faith attempts to comply with them").

So too with respect to the PLRA. If an objectively reasonable prisoner is left to a "guessing game" as to how to pursue his claim, no administrative remedy is "available."[19]

2. Administrative law lends further support to that conclusion. Section 1997e, which refers to "administrative" remedies, "points to the doctrine of exhaustion in administrative law." *Woodford*, 548 U.S. at 93. Indeed, Congress amended Section 1997e to bring the preexisting exhaustion requirement of the Civil Rights of Institutionalized Persons Act (CRIPA) "more into line with administrative exhaustion rules that apply in other contexts." 142 Cong. Rec. 5195 (1996) (statement of Assoc. Att'y Gen. John Schmidt).

As the court of appeals recognized, "the exhaustion requirement is not absolute" in administrative law. Pet. App. 9. At common law, the doctrine of exhaustion is "subject to numerous exceptions." *McKart* v. *United States*, 395 U.S. 185, 193 (1969). See also *Woodford*, 548 U.S. at 103 (Breyer, J., concurring) ("Administrative law, however, contains well-established exceptions to exhaustion."). As a general mat-

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[19] In briefly addressing habeas, the United States solely makes a factual argument—that "there was no external, objective impediment to respondent complying with the prison's grievance procedures." U.S. Br. 19 n.4. But that just assumes away the core dispute as to whether Maryland's exhaustion system was a confusing one. As the court of appeals below held, it was substantially confusing. Pet. App. 15. It is notable that the United States does not deny our legal contention.

ter, "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion." *McCarthy* v. *Madigan*, 503 U.S. 140, 146 (1992).

When a reasonable claimant would not understand how to use an administrative remedy, longstanding administrative law principles do not require exhaustion. This is compelled by the family of cases that petitioner characterizes as "undue prejudice" or "hardship." See Pet'r Br. 45-46.

*Bowen* v. *City of New York*, 476 U.S. 467 (1986), is instructive. There, claimants for social security disability benefits challenged a procedure used by the Social Security Administration for determining benefit eligibility. 476 U.S. at 469. They asserted that the Administration had "adopted an unlawful, unpublished policy under which countless deserving claimants were denied benefits." *Id.* at 473. Not all claimants, however, had properly exhausted their claims before the Administration. *Id.* at 482. The Court nonetheless found that the exhaustion requirement was "excused" because "'members of the class could not attack a policy they could not be aware existed.'" *Ibid.* The reasoning of the Court was straightforward: if a claimant cannot reasonably know what it is he or she should be complaining about to an agency, there is nothing for the claimant to exhaust.[20]

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[20] Going even further, the Court declined to require exhaustion from those litigants who could still have pursued an administrative remedy because they would have been "irreparably injured." *Bowen*, 476 U.S. at 482-486. That reasoning would support an extra-textual exception to the PLRA's exhaustion re-

Administrative law principles—like the Court's habeas precedents—thus confirm that, in limiting the PLRA exhaustion requirement to those remedies that are "available," Congress intended to require prisoners to exhaust only those remedies that an objectively reasonable prisoner would understand how to use.

### C. The statutory purpose compels our interpretation of "available."

The PLRA's exhaustion mechanism is not an invitation for prisons to erect indecipherable administrative barriers, and thus bar from court any prisoner who fails to navigate the opaque remedial system with precision. Congress introduced the concept of "availability" to ensure that prisons maintain a minimal standard of clarity with respect to their administrative procedures.

1. If the Court reaches the question posed in the petition, this case will have profound implications for prison administrative procedures.

If the Court affirms the longstanding meaning of "available," the States will continue to have an incentive to promulgate and administer clear prison grievance procedures that will inform objectively reasonable prisoners how to pursue their claims. If a prison's procedures are clear, they will be "available."

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quirement, in accord with the analysis adopted by the court of appeals. See Pet. App. 9-11. Indeed, the Court has recognized time and again that "[a]dministrative remedies that are inadequate need not be exhausted." *Coit Indep. Joint Venture* v. *Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 587 (1989). We submit, however, that the Court need only resort to extra-textual exceptions if it disagrees with our (and the United States') interpretation of the statutory term "available."

Petitioner's contrary view—that courts can *never* "scrutinize the adequacy of a prison's administrative remedy process to determine whether it met a particular standard of clarity * * *" (Pet'r Br. 37-38)—would encourage prisons to lard their administrative procedures with ever greater complexity. Indeed, absent an outer limit, "the PLRA's exhaustion rule actually provides an incentive to administrators in the state and federal prison systems and the over 3,000 county and city jail systems to fashion ever higher procedural hurdles in their grievance processes." See Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons*, 11 U. Pa. J. Const. L. 139, 149 (2008). It is thus easy to see why Congress intended to provide prisons a nudge toward simple administrative procedures.

To be sure, Congress designed the PLRA to reduce judicial scrutiny of prison procedures. The term "available" is far less restrictive than the requirement that a remedy be "plain, speedy, and effective"—as the predecessor statute, the Civil Rights of Institutionalized Persons Act, required. See Pet'r Br. 37-38. But the dispute here is not whether the PLRA *reduced* judicial scrutiny of prison administrative remedies—it is whether the PLRA *eliminated* it altogether.[21]

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[21] An objectively reasonable prisoner may understand which administrative procedure to use and how to use it, even though that procedure would not have qualified as "plain, speedy, and effective" under the now-displaced CRIPA regime. See *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). Under CRIPA, courts went so far as to dictate specific administrative procedures that prisons had to adopt in order to benefit from exhaustion, even ordering prison administrators "to draft policy directives." *Knop* v. *Johnson*, 977 F.2d 996, 1010 (6th Cir. 1992). Our interpretation of

Congress did not intend to eliminate *all* judicial scrutiny of prison grievance procedures. If it had wanted to do so, Congress would not have used the word "available" in Section 1997e(a). Congress could have, for example, precluded federal prison litigation wholesale *whenever* a prison had an internal grievance process. Congress, moreover, could have required a prisoner to exhaust "*all* remedies" or "*any* remedies." It did none of these things. It instead limited exhaustion to "available" remedies.

With the PLRA, Congress intended to ensure "that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones*, 549 U.S. at 203. Congress thus wished to "facilitate consideration of the good" prisoner suits. *Id.* at 204. During the PLRA floor debate, legislators repeatedly emphasized that the exhaustion provision was targeted at *frivolous* suits, not meritorious ones. See, *e.g.*, 141 Cong. Rec. 14571 (1995) (statement of Sen. Bob Dole) (purpose of PLRA to "curtail frivolous prisoner litigation"); 141 Cong. Rec. 27042 (1995) (statement of Sen. Orrin Hatch) ("I do not want to prevent inmates from raising legitimate claims. This legislation will not prevent those claims from being raised."); 141 Cong. Rec. 27044 (1995) (statement of Sen. Strom Thurmond) ("This amendment will allow meritorious claims to be filed.").

Thus, in interpreting the PLRA, this Court "presume[s] that Congress was sensitive to the real-world problems faced by those who would remedy constitutional violations in the prisons and that Con-

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the term "available" thus does not conflict with the PLRA's elimination of the "plain, speedy, and effective" language from Section 1997e(a).

gress did not leave prisoners without a remedy for violations of their constitutional rights." *Brown* v. *Plata*, 131 S. Ct. 1910, 1937 (2011). "Prison walls," after all, "do not form a barrier separating prison inmates from the protections of the Constitution." *Turner* v. *Safley*, 482 U.S. 78, 84 (1987).

For these reasons, the position of the *amici* States is difficult to understand. Their principal contention is that "existing prison grievance procedures are designed to be simple and accessible for inmates." States *Amicus* Br. 3. They catalog the policies of multiple states, concluding that they satisfy this goal of being "simple and accessible for inmates." *Id.* at 25. In states where that is so, the administrative remedies are "available" under our definition. The issue posed here will never matter.

It is, of course, commendable that many *amici* States have such clear procedures. But perplexing policies are known to exist. In Connecticut, for example, one inmate grievance form stated that a complaint regarding "'[h]ealth services diagnosis or treatment'" is "'not grievable.'" *O'Donnell* v. *State*, 2004 WL 2222926, at *5 (Conn. Sup'r Ct. 2004). Elsewhere, the same form said that "'[a]ll health care related grievances shall be placed in a box designated for health services grievances and shall be processed by the designated Health Services Grievance Coordinator.'" *Ibid.* It was, a court found, "difficult to make sense of this." *Ibid.* The court ultimately rejected the exhaustion defense because "the regulations involved are confusing and difficult to understand regarding the issue of whether the grievance procedure is available." *Id.* at *6.

And, as we have shown with respect to Maryland, the procedures that prisoners were required to

follow to exhaust their claims when the IIU was investigating were simply unknowable. Indeed, "in many jails and prisons, administrative remedies are, unfortunately, very difficult to access," and prisoners "operat[e] under rules * * * [that] are often far from clear." Schlanger & Shay, *supra*, at 147-148. Given that prisoners "generally are untrained in the law and are often poorly educated" (*Woodford*, 548 U.S. at 103), the net effect of such complication is that prisoners—even those with meritorious claims—will be barred from court because of overly ambiguous prison rules.

With the PLRA, Congress ended judicial micromanagement of prison administrative remedies, but it expressly kept an outer boundary beyond which a remedy would cease to be "available." All courts of appeals to have considered this issue agree. Petitioner would wipe this away. He would invite every prison across the country to play "hide-and-seek with administrative remedies." *Goebert*, 510 F.3d at 1323. While "the Queen [of Hearts] would be proud" (*ibid.*), Congress would not.

2. Our interpretation of the term "available" also comports with Congress's interest in decreasing the quantity, but increasing the quality, of prisoner lawsuits. See Pet'r Br. 5, 36-37. The exhaustion requirement is designed, in substantial part, to aid courts in identifying meritorious prison claims. *Jones*, 549 U.S. at 213.

For an administrative procedure to advance this purpose of sorting good from bad, it must make it fairly possible for a prisoner to present the merits of the grievance. If an administrative procedure is so complex that a prisoner is left to guesswork, it will

filter out claims at random. A roulette wheel would serve the same purpose.

Petitioner fears that a decision adverse to him "would eviscerate the PLRA's mandatory exhaustion requirement" and "undermine[] all of the[] advantages that Congress sought to achieve" in the PLRA. Pet'r Br. 41-42. He can make these claims only by closing his eyes to what the term "available" means. If a prison creates a system that is *actually* "simple and accessible" (States *Amicus* Br. 25)—both on paper and in practice—it will have every benefit of the exhaustion defense. Here, 39 States have signed an *amicus* brief asserting that this describes their *current* administrative procedures; no state, except perhaps Maryland, suggests that this is too tall an order.

### D. Because an objectively reasonable prisoner would not have understood how to pursue respondent's claim, no remedy was "available."

Recognition that respondent *correctly* navigated Maryland's grievance procedure resolves this case. Assuming, for sake of argument, that we were wrong on that score, the administrative procedure that respondent supposedly should have used would not qualify as "available" because no objectively reasonable prisoner would have known to use it.

1. We have carefully examined the Maryland grievance system, and, as we have described, our findings show that, when an IIU investigation was underway, the relevant authorities charged with administering the prison grievance system routinely dismissed both ARP complaints and direct IGO complaints as procedurally improper. See, *supra*, pages

15-30. Against this backdrop, petitioner cannot seriously maintain that an objectively reasonable prisoner would have understood that he had to use one of these procedures (much less *which* of the two) in parallel with an IIU investigation. See Pet'r Br. 49-52.

On the one hand, if the prison administrators were *correct* when they dismissed prisoner grievances because of a parallel IIU investigation, then it follows that no administrative remedy was "available" to respondent at all. In our view, the prison administrators *were* correct: not only were the administrators best positioned to know how the system actually operated, but their approach accorded with the IIU's exclusivity regulation. If this is so, then petitioner (represented by the Attorney General himself) is wrong. If even the Maryland Attorney General has trouble navigating the relevant administrative procedures, an objectively reasonable prisoner would be all at sea.

On the other hand, if (contrary to fact) *petitioner* is correct, and the presence of an IIU investigation did not bar an ARP or an IGO complaint, then these *prison administrators* were wrong when they dismissed prisoner grievances on this basis. Under that scenario, the result would be troubling: the very individuals *charged with administering the grievance system* did not know how the procedures actually worked. It is difficult to conceive of more telling evidence that the system was indecipherable.

Petitioner criticizes respondent for not studying the prison handbook, asserting that this "reason alone" forecloses his claim. Pet'r Br. 49-50. But what good would the handbook have done? As petitioner explains (*id.* at 7), the handbook instructed inmates

to file an ARP—but, in actuality, that remedy was decidedly *un*available. See, *supra*, pages 15-24. And even aside from that, the handbook did not inform inmates that they should file complaints directly with the IGO, but petitioner now faults respondent for not doing exactly that. See, *supra*, pages 24-25.

Petitioner's argument with respect to the handbook is also flawed as a matter of law. We do not disagree that, in assessing whether an objectively reasonable prisoner would understand which procedure to use with respect to a particular claim, the contents of a prison handbook are relevant. But the proper test is objective: the administrative remedy is either "available" for all prisoners in respondent's circumstances, or it is "available" to none of them. Whether an individual plaintiff actually read the prison handbook, therefore, is entirely beside the point. No one suggests that federal courts should engage in a case-by-case examination of whether a particular prisoner did sufficient due diligence to have been *subjectively* reasonable.[22]

The relevant inquiry is easily answered in the circumstances of this case. An objectively reasonable prisoner in respondent's shoes could do no better than to guess at whether he should pursue a claim via the ARP, the IGO, the IIU, or some combination

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[22] For this reason, petitioner's criticism of the court of appeals for not addressing whether respondent himself read the handbook (Pet'r Br. 50) and for making a "counterfactual assumption" (*id.* at 51) widely misses the mark. The court of appeals engaged in a run-of-the-mill objective reasonableness analysis, examining the facts as they actually existed, not as respondent subjectively perceived them. See *Heien* v. *N. Carolina*, 135 S. Ct. 530, 539 (2014).

of the three. As a result, no administrative remedy can be fairly described as "available."

2. Because this test is objective, we do not contend that a prisoner can point to an internal prison investigation as proof that he, as a subjective matter, was confused about which administrative procedure he should have used. Cf. Pet'r Br. 52-54. If a state permits a prisoner to pursue an administrative procedure that is parallel to a prison disciplinary investigation—and its policies in this regard are clear—the mere fact that the prison conducted an investigation is no basis to conclude that the administrative remedy was unavailable. Those are not, however, the facts of this case.[23]

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The PLRA's use of the term "available" requires that a prison's administrative remedy have a minimal degree of clarity; an objectively reasonable prisoner must be able to understand which procedure to

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[23] In any event, a thorough investigation occurred here. The prison conducted a year-long investigation, resulting in a lengthy report with substantial factual findings, and the prison effectively fired Madigan. See JA 186-265. The prison warden substantiated respondent's key contention that the "use of force was unnecessary[,] therefore it was excessive." CA4 JA 56. Petitioner is thus wrong to say that "the prison had no opportunity to resolve any of [respondent's] claims for relief before he filed this suit." Pet'r Br. 54. Indeed, the prison could have offered respondent a settlement, along with a liability release—it just never did so.

Petitioner's more limited contention is that the investigation did not specifically address Ross's culpability. Pet'r Br. 54-55. But that simply isn't so. The investigation considered the conduct of Ross at great length (JA 192-193, 201-202, 203-204, 205-206, 207, 212, 214, 219-220, 221-223, 227-230, 241-242, 247-248) and took a witness statement from him (JA 198, 216-218).

use and how to use it. According to the 39 States that appear as *amici*, their prison administrative remedies easily satisfy this requirement: their "existing prison grievance procedures are currently designed to be simple and accessible for inmates." States *Amicus* Br. 25. This is, of course, little surprise since the courts of appeals have long held that a remedy is "available" only if a reasonable prisoner can know how to use it.

But the administrative procedure at issue here—how a Maryland prisoner was to exhaust a claim investigated by the IIU, prior to amended Directive 185-003—was anything but clear. Before this Court, the Maryland Attorney General repeatedly mischaracterizes how Maryland's grievance process actually worked. If the administrative procedure is so convoluted that the Maryland Attorney General cannot, even now, accurately and concretely describe what it was that respondent should have done, the remedy was surely too confounding to qualify as "available" as that term is used in the PLRA.[24]

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[24] The court of appeals expressly did "not reach the issue of whether [petitioner] waived" the exhaustion defense. Pet. App. 6. Although respondent advanced this argument in the opposition brief (Opp. Br. 10-14), petitioner does not now address the issue, and we accordingly do not ask the Court to consider the argument. In the event of any remand, that question should remain open for the court of appeals to resolve. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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